SADISTS IN THE BOXING RING: MORAL INCONSISTENCY AND THE CRIMINAL LAW

INTRODUCTION

Why should a sadist, who derives pleasure from the pain of another,[1] be subject to criminal prosecution from acts taking place in the bedroom, but not in the boxing ring?[2] When the criminal law moves beyond its core functions to the policing of morality, it risks oppressing civil liberties and losing community respect as moral inconsistencies are inevitably exposed. Firstly, this essay will provide a brief overview of what has classically been considered the core functions of the criminal law. It will then explore how the harm and morality principles in criminal law have generally been applied to the areas of sadomasochistic sex (SM) and violence in sport. It is submitted that the inconsistent treatment of violent acts in the two circumstances goes against the principle of equal treatment – that similar cases should be subject to similar treatment under the law.[3] Finally, this essay will argue that a framework of consent and prevention of harm should be the core consideration for the criminal law if civil liberties are to be protected and community respect maintained.

CORE FUNCTIONS OF CRIMINAL LAW

It is generally considered that there are three main justifications for the criminalisation of certain behaviours: the prevention of harm, the vindication of moral values and the expression of legitimate public concern.[4] The harm principle was most significantly described by John Stuart Mill, arguing that the only legitimate reason power may be exercised over an individual is to prevent harm being done to others.[5] This principle becomes a balancing act between two competing forces: the interests of the state and the wider community against the freedom and autonomy of individuals.[6] A more contentious justification for criminalisation is enforcing the dominant moral values of the community.[7] The inherently subjective nature of morality causes a conflict between not only the enforcement of morals and the cost to individual liberty, but also the conflicting morals of different groups within the community, resulting in a principle that can be particularly contentious.[8] Finally, the expression of legitimate public concern regards the conception of a crime as an act which is a public wrong, as opposed to a private wrong that could be addressed through the civil law.[9] The application of the criminal law inherently requires balancing the competing principles of civil liberties on one side and the prevention of harm and the protection of (often competing) community values on the other.

HOW THE CRIMINAL LAW HAS BEEN APPLIED

Sadomasochistic Sex (SM)

The criminal law surrounding acts of violence committed during SM has seen the principles of harm, morality and public wrongs applied by the courts. Although there are a broad range of activities which may fit under the

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[1] Kelly Egan, 'Morality-Based Legislation is Alive and Well: Why the Law Permits Consent to Body Modification but not Sadomasochistic Sex' (2007) 70 *Albany Law Review* 1615, 1617.
[2] See generally *R v Brown* [1994] 1 AC 212; *Pallante v Stadiums Pty Ltd (No 1)* [1976] VR 331.
[3] A J Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225, 245.
[4] Penny Crofts, Thomas Crofts, Stephen Gray, Tyrone Kirchengast, Bronwyn Naylor and Steven Tudor, *Waller & Williams Criminal Law: Text and Cases* (LexisNexis Butterworths, 13th ed, 2016), 6.
[5] John Stuart Mill, *On Liberty* (Penguin Books, 1st ed, 1998).
[6] Crofts, Crofts, Gray, Kirchengast, Naylor and Tudor, above n 4, 7.
[7] Crofts, Crofts, Gray, Kirchengast, Naylor and Tudor, above n 4, 9.
[8] See generally Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, 1968); H L A Hart, *Law Liberty and Morality* (Oxford University Press, 1st ed, 1968).
[9] Crofts, Crofts, Gray, Kirchengast, Naylor and Tudor, above n 4, 12.

definition of SM, it typically involves a sadist who inflicts pain and/or exerts control over another person, the masochist, for the purposes of sexual pleasure for both participants.[10]

The seminal case of *R v Brown* resulted in the conviction of a group of men engaged in consensual homosexual SM acts which were the subject of no complaint, but were instead discovered during an unrelated police operation.[11] Lord Templeman in his judgement stated that violence in the course of SM involved an 'indulgence of cruelty' of which consent should not be a defence and therefore dismissed the appeal.[12] In his dissenting judgement, Lord Mustill argued on the question of whether there was a compelling reason to criminalise the behaviour, rather than whether or not consent should be a defence to what was considered to be prima facie criminal behaviour by the majority judgement.[13] Lord Mustill, although certainly not endorsing the conduct of SM, contended that the 'consensual private acts' involved should not be considered as offences against the existing criminal law.[14]

In *R v McIntosh* the accused was convicted of manslaughter for causing the death of the victim by wrapping a cord around the victim's neck during sexual activity.[15] Vincent J stated that the conviction was for the 'societal need to deter engagement in unlawful physically violent and life threatening acts… or death through grossly negligent conduct' and specified that the conviction was not based on a 'moralistic response to the sexual predilections of those involved in… sadomasochistic activities.'[16] This provides a stark contrast to the decision in *R v Brown* where Lord Templeman stated that '[s]ociety is entitled and bound to protect itself against a cult of violence' making a clear moral judgement that violence inflicted in the course of SM should be subject to the criminal law.[17]

The principle that consent is no defence to actual bodily harm when it is inflicted during the course of SM was subsequently upheld in Victoria in the case of *R v Stein*.[18] In this case, the victim died after being gagged with two knotted handkerchiefs in the course of SM.[19] In his judgement Kellam JA focused on the seriousness of potential injuries, stating that 'where a risk of serious injury arose, the issue of consent became irrelevant.'[20]

In 1994, the United Nations Human Rights Committee (UNHRC) delivered its consideration[21] of the submission by Australian Nicholas Toonen regarding the criminalisation of consensual homosexual male sex under the *Criminal Code Act 1924* (Tas). The UNHRC agreed with Toonen that the Tasmanian laws violated his right to privacy under the *International Covenant on Civil and Political Rights*.[22] In response, the Federal Government passed the *Human Rights (Sexual Conduct) Act 1994* (Cth) which provided under s4 that:

> (1) Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights.
>
> (2) For the purposes of this section, an adult is a person who is 18 years old or more.

The passing of the *Human Rights (Sexual Conduct) Act 1994* (Cth) effectively achieved the decriminalisation of homosexuality in Tasmania, however it may also have wider implications regarding broader 'sexual conduct'

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[10] Kelly Egan, 'Morality-Based Legislation is Alive and Well: Why the Law Permits Consent to Body Modification but not Sadomasochistic Sex' (2007) 70 *Albany Law Review* 1615, 1617.
[11] *R v Brown* [1994] 1 AC 212.
[12] Ibid, 236.
[13] Ibid, 274.
[14] Ibid, 275.
[15] *R v McIntosh* [1999] VSC 358.
[16] Ibid, [22].
[17] *R v Brown* [1994] 1 AC 212, 237.
[18] *R v Stein* [2007] 18 VR 376.
[19] Ibid.
[20] Ibid, [22].
[21] Human Rights Committee, *Views: Communication No 488/1992*, 50th sess, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) ('*Toonen v Australia*').
[22] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1996, 999 UNTS 171 (entered into force 23 March 1976).

potentially including SM. [23] The status of SM under the criminal law would appear to be potentially incongruous with the civil liberties protected by the *Human Rights (Sexual Conduct) Act 1994* (Cth).

Violence in Sport

Boxing

The English decision of *R v Coney* held that bare-knuckled prize-fighting was considered a breach of the peace and as such the consent of the participants was irrelevant in determining the criminality of their actions.[24] As a result of this decision, bare-knuckled prize-fighting (along with activities such as duelling) was considered not to be an exception to the general principles of assault.[25] In comparison, the sport of boxing with gloves was not considered to be a breach of the peace in the same way as bare-knuckled prize-fighting, and continues to be a lawful pursuit to the present day.[26]

In Australia, the decision in *Pallante v Stadiums Pty Ltd* confirmed the status of gloved boxing as one of the exceptions to the general common law rule that one cannot consent to the infliction of actual bodily harm.[27] In this case, a civil action for damages led to the defendant arguing that professional boxing contests were in fact unlawful at common law.[28] McInerney J held that boxing was not an unlawful activity, largely due to the fact that the rules of the sport 'ensure that the infliction of bodily injury is kept within reasonable bounds' and that the activities were engaged in as a 'sport or contest' rather than mere violence from a 'motive of personal animosity'.[29] In his dissenting judgement in *R v Brown* Lord Mustill referred to the decision in *Pallante v Stadiums Ptd Ltd* regarding boxing as a situation that 'stands outside the ordinary law of violence' not because of careful legal reasoning but simply because 'society chooses to tolerate it.'[30]

Non-violent Sports

Apart from boxing, there is the more nuanced issue of violence in other sports where a player may inflict harm upon another in an act that is outside the rules of the game. Participants in sport will generally be understood to have consented to physical contact that falls within the limits of the rules of the game.[31] However, victims and prosecutors have generally been reluctant in pursuing criminal charges for sporting incidents, even where the violence is clearly beyond the limits of the game.[32] It has been argued that this is because a participant in sport consents not only to acts within the rules of the game, but also to the ordinary risks of engaging in the game.[33] Particularly in Australia, it appears that authorities are comfortable to leave disciplinary measures to private sports tribunals rather than invoke the criminal law in most cases concerning violence in sport.[34] In *R v Matthews,*[35] Leigh Matthews struck another player during a Victorian Football League match resulting in a broken jaw for the injured player. Matthews was convicted in the Magistrate's Court of assault occasioning actual bodily harm

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[23] Theodore Bennett, 'Sadomasochism Under the Human Rights (Sexual Conduct) Act 1994' (2013) 35(3) *Sydney Law Review* 541, 545.
[24] *R v Coney* (1882) 8 QBD 534.
[25] Paul Farrugia, 'Consent Defence: Sports Violence, Sadomasochism, and the Criminal Law' (1997) 8 *Auckland University Law Review* 472, 476.
[26] Jack Anderson, 'The Right to a Fair Fight: Sporting Lessons on Consensual Harm' (2014) 17 *New Criminal Law Review* 55, 61.
[27] *Pallante v Stadiums Pty Ltd (No 1)* [1976] VR 331.
[28] Ibid.
[29] Ibid, 343.
[30] *R v Brown* [1994] 1 AC 212, 265.
[31] Chris Davies, 'Criminal Law and Assaults in Sport: An Australian and Canadian Perspective' (2006) 30 *Criminal Law Journal* 151.
[32] Liam Elphick, *West Coast's Gaff gets eight weeks for punch, but legal ramifications could go further* (8 August 2018) The Conversation < https://theconversation.com/west-coasts-gaff-gets-eight-weeks-for-punch-but-legal-ramifications-could-go-further-101092>.
[33] David Ross, 'Consent in Criminal Law' (2009) 32 *Australian Bar Review* 62, 63.
[34] Farrugia, above n 25, 484.
[35] (Magistrates Court, Victoria, 1985, unreported).

however this was overturned on appeal.[36] Even where contact is clearly outside the limits of the rules of the game, it appears that sport continues to generally be an accepted exception to the application of the criminal law in cases of actual bodily harm.[37]

THE MORAL INCONSISTENCY

When viewing the summaries above, it appears that there is a moral inconsistency in the way cases of violence in SM and sport are subject to the application of the criminal law, resulting in a significant risk of oppressing civil liberties and losing community respect. The inherently controversial nature of morality means that when the criminal law attempts to enforce moral standards it necessarily results in inconsistency. It is therefore submitted that the primary act of concern to the criminal law should be the intentional infliction of harm upon another person, and in the cases of boxing and SM it is difficult to see on what basis the two may be distinguished.[38] In this case, it appears that where intention of inflicting harm is very similar, a subjective moral judgement is made with regard to the applicability of the law to one situation and not the other.

The case of *R v Brown*[39] provides one of the clearest examples of the moral judgements made in determining the limits of consent to harm. In the case of sadomasochism, the principle of bodily integrity is not used to protect individuals from unwanted physical interference but instead to prevent individuals participating in desired and consensual sexual activity.[40] In comparison, *Pallante v Stadiums Pty Ltd (No 1)*[41] upheld the legality of boxing even though the underlying intention to inflict harm upon another person was clearly present. Lord Mustill commented that in such cases the court '[makes] a value judgement, not dependent upon any general theory of consent'[42] and it is submitted that such an approach inevitably leads to stark moral inconsistency. Consent is no defence where injuries are inflicted because of consensual homosexual SM while injuries of similar severity inflicted during sport may be explained by the consent of the participants.[43]

RESOLVING THE INCONSISTENCY

The Social Disutility Model and Consent

By reframing questions of violence in both SM and sports in terms of social disutility and consent, individual freedoms can be protected, and the imposition of restrictive moral standards upon the entire population avoided. Adults of sound mind should be afforded as much autonomy as is reasonably possible with regards to their private sexual activities, including the ability to consent to some level of harm.[44]

David Kell proposed the use of a social disutility model, where unless the prosecution is able to prove that persuasive reasons existed for the criminalisation of certain conduct, consent should be effective up to the level of grievous bodily harm.[45] This is in contrast to the approach adopted by the majority in *R v Brown* where the infliction of bodily harm was considered to be prima facie unlawful, and the question considered was whether or not the defence of consent should be extended in the case of SM.[46] Kell argued that the approach in *R v Brown*

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[36] Davies, Chris, 'Criminal Law and Assaults in Sport: An Australian and Canadian Perspective' (2006) 30 *Criminal Law Journal* 151, 152.
[37] Although cases of violence in sport are generally not subject to formal prosecution under the criminal law there are still some notable exceptions, generally involving incidents of strikes to the head or neck from behind. See, eg, *Abbott v R* (1996) 16 WAR 313.
[38] Farrugia, above n 25, 500.
[39] [1994] 1 AC 212.
[40] Theodore Bennett, 'Sadomasochism Under the Human Rights (Sexual Conduct) Act 1994' (2013) 35(3) *Sydney Law Review* 541, 561.
[41] [1976] VR 331
[42] *R v Brown* [1994] 1 AC 212, 265.
[43] David McArdle, 'A Few Hard Cases – Sport, Sadomasochism and Public Policy in the English Courts' (1995) 10 *Canadian Journal of Law and Society* 109, 110.
[44] Kenneth Arenson, 'Consent as Common Law Defence to Non-sexual Assaults: The Effect of Neal v The Queen' (2014) *University of Tasmania Law Review* 33(2), 300.
[45] David Kell, 'Social Disutility and the Law of Consent' (1994) 14 *Oxford Journal of Legal Studies* 121, 127.
[46] *R v Brown* [1994] 1 AC 212, 234.

results in a failure by the law to adequately explain why certain activities warrant exceptions while others do not.[47] Furthermore, modern principles of privacy appear to be at odds with the criminalisation of SM, particularly in light of the *Human Rights (Sexual Conduct) Act 1994* (Cth) which it has been argued provides SM some protection as 'sexual conduct'.[48] It is submitted that the social disutility model proposed by David Kell is the preferred approach to that which was adopted in the majority judgement of *R v Brown*, and is better suited to modern democratic principles of individual autonomy.[49]

The social disutility model enables consent to be used as a mechanism for protecting the civil liberties of consenting adults wishing to engage in potentially harmful activities such as SM and sports such as boxing. Concerns regarding the potential legitimacy of consent during SM encounters can be mitigated by the provisions in the *Crimes Act 1958* (Vic) which provides a definition of consent as 'free agreement'[50] as well as outlining situations in which a person does not consent.[51] It is submitted that the communicative model of consent endorsed by the Victorian Law Reform Commission[52] should be proposed as a means by which to protect individuals from harm while at the same time expanding civil liberties with regards to risky activities. The communicative model of consent could have practical application to both SM and sport by clearly outlining the limits of consent to harm in the respective activities. Indeed, consent in the context of SM often involves a far more nuanced and in-depth discussion of consent more in line with the communicative model of consent.[53] The common law has held that an individual cannot consent to being killed or a significant risk of being killed,[54] and it is not proposed to depart from this. By taking the approach outlined above, individuals would be able to consent to a certain level of harm,[55] and the criminal law would have greater legitimacy in its intervention when harm breaches that level.

The Limits of Consent

There are however distinct difficulties with the use of consent in the context of SM encounters. In the context SM where force and violence are generally involved, a defendant could conceivably argue they had a reasonable belief of consent in a wide variety of situations.[56] This could increase the difficulty of proving a lack of consent in rape and sexual assault cases, which could impact the already low-levels of conviction.[57] However, it is submitted that by promoting the communicative model of consent as outlined earlier in this essay, a more reliable criminal process can result.

Consent cannot reasonably be a defence to all levels of harm, it must be considered whether particular conduct is so averse to the interests of society that the accused should be subject to the criminal law regardless of any consent by the victim.[58] The rule of law is not suspended during a sporting match, and merely because a player consents to some level of physical contact does not mean that they consent to serious assault.[59] By placing limits of consent

[47] Kell, above n 45, 127.
[48] Theodore Bennett, 'Sadomasochism Under the Human Rights (Sexual Conduct) Act 1994' (2013) 35(3) *Sydney Law Review* 541, 550.
[49] Kell, above n 45, 128.
[50] *Crimes Act 1958 (Vic)*, s36(1)
[51] Ibid, s36(2)
[52] Victorian Law Reform Comission, *Sexual Offences: Final Report*, Report No 78 (2004).
[53] Cheryl Hannah, 'Sex is Not a Sport: Consent and Violence in Criminal Law' (2001) 42 *Boston College Law Review* 239, 247.
[54] Michael Allen, 'Consent and Assault' (1994) 58(2) *Journal of Criminal Law* 183, 185.
[55] Although consent could be effective to a wide range of harms, this essay proposes that consent should be effective only up to the level of grievous bodily harm, without a significant public interest defence such as in the case of surgery. See Paul Farrugia, 'Consent Defence: Sports Violence, Sadomasochism, and the Criminal Law' (1997) 8 *Auckland University Law Review* 472, 498; David Kell, 'Social Disutility and the Law of Consent' (1994) 14 *Oxford Journal of Legal Studies* 121, 127.
[56] Hannah, above n 53, 285.
[57] Kathleen Daly and Brigitte Boughours, 'Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries' (2010) 39 *Crime & Justice* 565, 598.
[58] Farrugia, above n 25, 473.
[59] Anneliese Nelson, 'When, Where and Why Does the State Intervene in Sport' (2005) *Sports Law eJournal* 14 < https://epublications.bond.edu.au/slej/1/>.

only to harm below the threshold of grievous bodily harm, individual liberties can be maximised while also protecting individuals from more serious harms.

CONCLUSION

The application of the criminal law to violence in SM and sport has exposed profound moral inconsistencies which risk the oppression of civil liberties and the loss of community respect. Criminalisation of consensual acts of violence during SM restricts individual liberties and appears at odds with the right to privacy protected by the *Human Rights (Sexual Conduct) Act 1994* (Cth). The unpredictable way in which the law is applied to violence in sport runs a substantial risk of losing community respect, as some acts are subject to criminal prosecution and other, similar acts are not. Furthermore, the moral judgements made by courts in assessing whether to criminalise conduct in SM and sport is inconsistent at best, and at worst risks damaging community trust in the law. This essay contends that a communicative model of consent provides an excellent framework for the application of the criminal law to violence in SM and sport. A strong framework of consent will allow individual liberty to consent to some level of harm while still protecting against the infliction of grievous bodily harm, of which consent should not be a defence. The overly moralistic application of the criminal law with regards to violence in SM and sport has oppressed civil liberties and runs a substantial risk of losing community respect. A strong focus on the harm principle and the rights of individuals to consent to harm will ensure the protection of those liberties and increased community trust in the law.

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